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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 115

D. P. SKOUSEN, COIT HUGHES, H. B. HUGHES, H. L. MOSHER,

Petitioners,

vs.

CONSOLIDATED MOTORS, INC.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA AND BRIEF IN SUPPORT THEREOF.

JOHN J. MCCULLOUGH,
Counsel for Petitioners.

E. E. SELDEN,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA, AND BRIEF IN REQUEST THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:

Your petitioners, D. P. Skousen, Coit I. Hughes, H. B. Hughes, and H. L. Mosher, respectfully pray for a Writ of Certiorari to review the judgment in the Supreme Court of the State of Arizona entered on the 13th day of January, 1941, reversing the judgment of the Superior Court of Maricopa County, State of Arizona, rendered on the 18th day of March, 1940. The Motion for Rehearing in the Supreme Court having been denied on February 10th, 1941.

Short Statement of Matter Involved.

This matter was commenced in the Superior Court of Maricopa County, State of Arizona, by the Consolidated Motors, Inc. filing a Complaint to Quiet Title to certain real property.

Your petitioner Skousen answered denying title in respondents and asserting title in himself. Petitioners Hughes, Hughes, and Mosher answered denying title in the respondents Consolidated Motors, Inc. The matter was tried before the court sitting without a jury and the plaintiff Consolidated Motors, Inc. introduced evidence purporting to show title by Tax Deed from the Treasurer of Maricopa County and to show that the property to which title was sought to be quieted had been properly sold to the State of Arizona for delinquent taxes, and by the said Treasurer of Maricopa County assigned from the State of Arizona to two different individuals, who held title to the two different pieces of land at the time the suit was brought, and later both of these individuals sold to the Consolidated Motors, Inc.

September 19 and 26, 1931—Lot 7 and Lot 8 were advertised.

July 11, 1932—Both lots "Struck Off" to the State of Arizona.

May 15, 1939—North half of Lot 8, deeded, by the Treasurer, to W. R. Wayland and Fred G. Holmes.

July 5, 1939—Lot 7 deeded, by the Treasurer to Del E. Webb.

July 24, 1939—Suit to Quiet Title filed by the Consolidated Motors, Inc.

July 26, 1938—North half of Lot 8, deeded by Wayland and Holmes to the Consolidated Motors, Inc.

September 12, 1939—Lot 7 deeded, by Del E. Webb to the Consolidated Motors, Inc.

Evidence was then introduced on behalf of your petitioners.

At the close of the whole case both your petitioners and the respondent moved for judgment.

The matter was taken under advisement by the Presiding Judge, M. T. Phelps, who rendered judgment in favor of your petitioners (R. 24).

Upon appeal the judgment of the said Superior Court was reversed.

The questions involved in the Superior Court, as well as upon appeal, were relative to the validity of the various steps taken in the procuring of the aforesaid Tax Deed by and through which respondents claim title.

It is contended by your petitioners that because of the decision of the Supreme Court of the State of Arizona in reversing the aforesaid judgment of the Superior Court petitioners were deprived of their property without due process of law.

The deprivation arose by reason of the decision of the said Supreme Court of the State of Arizona and is inherent in said decision viewed in the light of the evidence as the same was presented to the Supreme Court in the Reporter's Transcript of Testimony.

Statement Disclosing Jurisdiction of This Court.

This cause was commenced by complaint filed in the Superior Court of Maricopa County, State of Arizona.

Said complaint was filed for the purpose of quieting title to certain real property (two adjoining pieces) situate in Maricopa County, Arizona.

Petitioners denied title in the respondent and judgment was rendered for petitioners in the said Superior Court (R. 24).

The cause was appealed to the Supreme Court of the State of Arizona where the judgment of the said Superior Court was reversed on January 13th, 1941 (R. 96).

A Motion for Rehearing was duly filed and said Motion for Rehearing was denied on February 10, 1941 (R. 97). Three months have not yet elapsed since said date.

The Supreme Court is the highest court in the State of Arizona.

See:

Arizona Code Annotated 1939, Volume 1, page 123; the Constitution of Arizona, Article VI, Section 1; and at page 125, of said Arizona Code Annotated 1939; the Constitution of Arizona, Article VI, Section 4.

The interpretation placed by the Supreme Court upon certain statutes of the State of Arizona, as well as the erroneous placing of the burden of proof, amounted under the evidence in the case to a taking of petitioners' property without due process of law.

The jurisdiction of the Supreme Court of the United States is therefore invoked by United States Code Annotated, Title 28, Sec. 344 (b), being Judicial Code Section 237, Amended.

Questions Presented.

1. The First Question presented is whether a decision of the Supreme Court of the State of Arizona stating that the burden of proof is upon one attacking a tax deed and not upon one claiming under it deprives the owner of his property without due process of law?

2. The Second Question presented is whether the assessment and advertisement for sale of your petitioners' property from an unrecorded map which describes the property by lots and blocks; whereas the so-called Official Map of the same premises, recorded, and introduced in evidence by your petitioners, shows that the property in dispute is not subdivided into lots, has no numbered blocks, and is

meticulously separated from the balance of the addition, of which it is a part, by dotted lines; without a showing that the owners of the land in controversy had any actual or constructive notice of such UNRECORDED MAP (filed in evidence by the respondents), constitutes a taking of property without due process of law?

3. The Third Question is whether the advertisement of Lot 8, Block 1, Churchill, as a single parcel of land and the redemption of one-half thereof, and the later issuance of a deed to an assignee of the State of Arizona, only for the North One Half of the so called Lot 8, Block 1, without any readvertisement thereof constitutes a taking of petitioners' property without due process of law?

Reasons for Allowance of Writ.

First Reason.

1. The Supreme Court of the State of Arizona has decided that upon the mere production of a Tax Deed the burden of proof, in Arizona, is upon him who attacks such deed to prove the invalidity thereof, rather than upon the proponent of the deed to prove the doing of all of the acts necessary to prove the validity thereof.

The taking of property by taxation has always been regarded as in the nature of a forfeiture and therefore the rights of the owner have always been zealously guarded.

It is the universal rule that, in the absence of statute, every step in the acquisition of a tax deed must be proved by the proponent and your petitioners submit that on account of the summary nature of such proceedings any other rule would amount to the taking of the property of the owner without due process of law.

Second Reason.

The opinion of the Supreme Court of the State of Arizona in this cause (R. 98) admits the land was assessed, adver-

tised and sold with reference to a map which the evidence shows was unrecorded (R. 103) and of which there was no showing, or attempt to show, that your petitioners, or the then owners of said premises had any actual notice. Only recorded instruments are constructive notice under the statutes of Arizona.

The taking of land for taxation purposes without proper notice to the owner is the deprivation of property without due process of law.

Third Reason.

The Supreme Court of the State of Arizona decided in its opinion in this cause that the treasurer of Maricopa County has the power to advertise and sell a lot as a single unit and then permit part thereof to be redeemed and issue a deed to the remainder of the lot to an assignee of the State of Arizona (holder of the Certificate of Purchase), without any readvertisement, or re-sale of the divided portion.

Such a procedure is in derogation of the Fourteenth Amendment to the Constitution of the United States and deprives the owner of his property without due process of law.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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BRIEF.

Opinion of the Supreme Court of the State of Arizona.

The Opinion rendered in this cause by the Supreme Court of the State of Arizona is found in 109 Pac. 2d at page 41.

Jurisdiction.

The facts upon which your petitioners rely for jurisdiction of this Court are fully set forth in the Petition for Writ of Certiorari, page 3 (In Certiorari), hereof, and for the sake of brevity incorporated in this brief by reference, only.

Facts.

The facts are also stated in the Petition, page 2 (In Certiorari).

Specification of Errors to Be Urged.

1. The Court erred in answering the first question relative to the burden of proof by stating that there is a presumption in proceedings for the collection of taxes that an officer has done his duty and that the burden of proving the contrary rests upon the assailant of the tax deed.

2. The Court erred in holding in answer to question No. 2 that the Assessor has a right to assess property, and the Treasurer had a right to advertise property for sale, according to a description on an unrecorded map used by the Assessor and differing from the map on file in the Recorder's Office of Maricopa County, Arizona, in that the particular lots and blocks attempted to be sold were delineated on the Assessor's unrecorded map, and not shown upon the recorded map, there being no evidence that the petitioners, or the then owners, had any actual or constructive knowledge of the existence of such unrecorded Assessor's Map and there being a Statute in Arizona laws making only recorded instruments constructive notice.

3. The Court erred in holding that the treasurer of Maricopa County, Arizona, is authorized to advertise and sell a parcel of land as a unit and permit the redemption of a part thereof and then without readvertisement or re-sale execute a deed to the assignee of the State of Arizona.

ARGUMENT.

Point I.

It is error to hold that the burden of proof in the absence of Statute is upon the person assailing a tax deed and since proceedings for the sale of property for delinquent taxes are in the nature of a forfeiture each step in the proceedings should be proved by a preponderance of the evidence or else the very trial amounts to a taking of property without due process of law.

Cooley Taxation, 4th Edition, Vol. 4, page 3012, Sec. 1548;
61 *Corpus Juris,* page 1369, Section 1948;
Williams v. *Peyton,* 4 Wheat. 77, 4 L. Ed. 518;
Thomas v. *Lawson,* 21 How. 331, 340, 18 L. Ed. 82;
Ganes v. *Dunn,* 14 Pet. 322, 10 L. Ed. 476;
Marx v. *Hanthorn,* 148 U. S. 172.

Point II.

It is deprivation of property without due process of law and contrary to the Fourteenth Amendment for property to be advertised and sold for delinquent taxes according to lots and blocks by a description taken from an unrecorded map of which the owner is not shown to have had actual or constructive knowledge, when the same property is shown upon the recorded map referred to in Respondent's Complaint, and the only recorded map introduced in evidence, as not being sub-divided into lots at all, and even the block

is not numbered in the recorded map which is headed as the:

> "Official Plat of the Resurvey of Churchill's Addition to the City of Phoenix, Maricopa County, Arizona Territory."

A certified photostatic copy of said "Official Plat" as it was introduced in evidence in the trial of this cause in the Superior Court of the County of Maricopa, State of Arizona, on behalf of your petitioners at the very outset of the trial of this cause.

That said "Official Plat" was introduced in evidence in the trial of this cause in the Superior Court is shown from the Opinion of the Supreme Court, itself (R. 102).

The Opinion also shows that a second map was introduced in evidence, by the respondent, on which the lots were shown.

A certified copy of both said maps is in the appendix to this brief marked as Exhibits "A" and "B", respectively.

The sole contention of the Arizona Supreme Court is that Section 3084 R. C. A. 1928, which may be found in Volume 5 of the Arizona Code Annotated 1939 at page 604, being Sections 73-413, empowers the Assessor to prepare maps and assess from these maps and thereafter the property may be advertised and sold by the Treasurer in accordance with such unrecorded maps.

It now is and has been from the very outset of this matter in the Superior Court strenuously contended by your petitioners that the Assessor has no power and no right to draw unrecorded maps describing, and thus virtually dedicating, the land in a different manner from the way in which the land is shown upon the recorded, official map. That even if the Assessor can prepare maps which differ from the Official Map in essential particulars he cannot assess land, nor

can the Treasurer, basing his proceedings upon such assessment, advertise land for sale in accordance with such maps when they differ from recorded, dedicatory, or official maps.

We contend that—Section 3084 R. C. A. 1928; Arizona Code Annotated 1939, at page 604, Sections 73-413 (*supra*); gives the Assessor the unquestioned right to REPRESENT on a map, kept in his office, for his convenience, CONDITIONS as they EXIST, but gives him NO RIGHT TO CREATE CONDITIONS, and such an act of CREATING CONDITIONS AND BOUNDARIES, AND STREETS AND ALLEYS, as he thinks they OUGHT TO BE, and numbering lots and blocks as he thinks they ought to be numbered, or as some other municipal corporation or political subdivision thinks they OUGHT TO BE, is not only taking property without due process of law but is not giving the owner of the "Assessorially Dedicated" land the equal rights of the owner of such land with the owners of other land which is assessed and taxed (and possibly sold) exactly as it is subdivided by themselves, or prior owners, as shown by RECORDED plats.

We also contend that when the Assessor draws maps, even from recorded maps, he must make his assessments from maps that show descriptions that have been signed by owners, or their authorized agents, and if there are none such he must make his assessments by the usual method for undedicated tracts, by metes and bounds.

It is petitioners' contention that the maps which the Assessor is authorized to draw are supposed to be in conformity to the "recorded plats" and are for use only in order that the Assessor may have a convenient and permanent record for HIS OWN USE upon which he may "check off" the various subdivisions as they are assessed, and that it was never intended that a subdivision which has never been officially divided into lots and blocks may be so

designated on the Assessor's own plat and then sold according to this arbitrary description.

Said Section 3084 R. C. A. 1928, reads as follows:

> "The assessor shall also have prepared maps of the various blocks within any city or town or any addition thereto, of each surveyed township, and of the surveyed mines of each mining district, upon which maps he shall check off the various subdivisions as they are assessed, and in each subdivision he shall mark the name of the person to whom assessed. Said maps shall be a permanent record of the county and the cost thereof shall be a county charge."

The Opinion says:

> "Under this section it was proper for the assessor to assess the lots in question from this map, NOTWITHSTANDING THAT THE ORIGINAL MAP OF CHURCHILL'S ADDITION FOUND IN BOOK 2 OF MAPS IN THE RECORDER'S OFFICE SHOWED BLOCK 1 NOT SUBDIVIDED INTO LOTS, and we think that under the provisions of section 56, Chapter 103, supra, the description was sufficient." (Capitals ours. R. 103.)

Section 56 of Chapter 103 of the laws of 1931 so far as applicable, provides:

> "No want of description or misdescription, or irregularity in the description of the property assessed upon the roll, if it can be ascertained or proved what property is intended, shall invalidate the assessment."

The interpretation which the Supreme Court of the State of Arizona has placed upon these sections of the Arizona Code of 1928 is, we submit, erroneous and in effect deprives your petitioners of their property without due process of law.

When the law says that the only description required is one from which the identity of the property can be "ascer-

tained or proved", this must be taken to mean ascertained or proved by reference to some recorded map.

It would be arbitrary and unreasonable to suppose that this section means, proved by means of a map drawn by the assessor himself and unrecorded.

If it be assumed that the assessor could draw a map showing lots not designated upon the official plat it certainly would be necessary in such a case to describe the land in all the tax proceedings with a specific reference to the assessor's map, otherwise where the official map shows no division into lots at all the uncertainty would void all the proceedings.

People ex rel. National Park Bank v. *Metz,* 126 N. Y. S. 986, 141 App. Div. 600 last paragraph on page 992 at bottom of 992 and top of 993;

Houghton v. *Kern Valley Bank,* 157 Cal. 289, 107 Pac. 113;

McLaughlin v. *Bonynge,* 15 Cal. A. 239, 114 Pac. 798 at page 799 Col. (3).

The fundamental rule in any description for the purpose of taxation is that the property must be so described as to give the owner notice that his land is to be sold and most courts hold that the land must be so described with reference to a recorded map.

Joliet Stove Works v. *Kiep,* 230 Ill. 550, 82 N. E. 875;

State ex rel. and to the use of Jennings v. *Hamilton,* 293 S. W. 378 (Mo.);

Matteson v. *Warwick Water Company,* 28 R. I. 570, 68 A. 577.

However there is an exception to this rule in a Nebraska case where the parties had sold and leased property with reference to an unrecorded map for a long period of time.

Roads v. *Estabrook,* 53 N. W. 64 (Neb.).

In the instant case there is no evidence to show that your petitioners, or their predecessors, had any knowledge even of the unrecorded map. The evidence fails to show that the former owner ever received any actual notice of the sale at all (R. 62, 63, 79, 80), and the evidence is even insufficient to prove mailing notice (R. 59, 63, 65, 66, 79, 80).

There are two other Arizona Statutes which throw some light on this question.

Arizona Annotated Code 1939, Section 17-1818,

being

Revised Code of Arizona of 1928, Section 3210,

restricts the dedication of City lots to the owners and requires that all conveyances shall thereafter be described with reference to such recorded plat.

Said Statute is set forth *haec verba* in the Appendix hereto, at page 20 of the Petition for Certiorari.

Since the issuance of the Treasurer's Deed to a private person is surely a conveyance of the property we submit that the description therein cannot be with reference to an unrecorded map.

There is still another section of the

Revised Code of Arizona 1928,

which should be cited and that is

Annotated Code of Arizona 1939 Section 71-426,

where only recorded documents are made constructive notice of their existence.

The error which is inherent in the Opinion of the Supreme Court of Arizona in this cause in construing Revised Code of Arizona, 1928, Section 3084 goes much deeper, however, than its mere repugnancy to other sections of our local statutes.

The logical effect of the decision of the Supreme Court of Arizona is to cause the Assessor of Maricopa County, Arizona, to lift himself by his own boot straps.

The Assessor is charged with making the assessment or levy and of course in order to make such assessment he must have proper maps to work from. It is fundamental that the property must be assessed according to a proper description yet the Supreme Court of Arizona has said in effect that the assessor can make his own description and write it on his own map which is merely a necessary part of the machinery for assessment and which is not recorded and this makes the description correct.

In effect the assessor must correctly describe the property, but if it is incorrectly described by the assessor the description is correct, nevertheless, because the assessor wrote the erroneous description into his assessment map.

The logical effect of this dilemma might have been avoided if the property had been advertised for sale with reference to the assessor's unrecorded map or if it had been shown that the assessor's map had ever been recognized by the owners of the property.

The very contrary of this is the case. The property was advertised merely as lots 7 and 8, Block 1, Churchill (R. 68, 69) and the very complaint under which the respondent is seeking to quiet title describes the premises by metes and bounds for certainty and with reference to the Recorded Map.

To this must be added the fact that evidence of the existence of any other subdivision by the name of "Churchill Annex" or just "Churchill" was specifically ruled out upon objection of the respondent (R. 61).

In view of all these matters the description of the property in all of the tax proceedings was insufficient and contravenes the fundamental requirements of due process of law.

Point III.

The third point as the second concerns the interpretation of a section of the Arizona Statutes, to-wit:

> Section 42 of Chapter 103 of the Session Laws of Arizona 1931 to be found in Volume 5, Annotated Code of Arizona 1939 at page 656 Section 73-828,

and reading as follows:

> "Any person owning an interest less than the whole in any real property, may redeem such interest by paying the proper proportionate part of the whole amount due, and shall receive a certificate of redemption for such interest in the manner herein provided."

The above statute is quoted *haec verba* in the opinion of the Supreme Court of Arizona (R. 105) and the court in its opinion has missed the true meaning of this law and given to it a meaning which clearly deprives the owner of his property without due process of law, or any process of law at all.

It is the view of the Arizona Supreme Court as evidenced by the opinion in this cause (R. 105) that the words

> "Interest less than the whole in any real property"

means that if a person becomes the owner of one half of the actual physical property as the same can be divided by metes and bounds or otherwise that such person can redeem his one half (½) from a sale of the whole parcel of land as a unit by the payment of one half of the taxes.

The error inherent in such a view is that John Doe who becomes the owner of one half of a lot does not have any interest in the "lot" viewed as a unit. He has an interest only in one half a lot, i. e., he owns the one half outright. In the remaining one half of the lot which has been sold as a unit for taxes he has no interest whatsoever and there-

fore John Doe does not have any undivided interest in the real property as contemplated by

> Section 42 of Chapter 103, of the Session Laws of 1931

as quoted above.

The true meaning of the law is that the interest must be some undivided inferest in the "whole" property as a "Unit" as it was sold, such as that of tenants in common, or joint tenants and can not apply to the owner of a certain portion of the ground itself.

The view taken by the Supreme Court of Arizona clearly sanctions the taking of the property without due process of law. For if, by way of analogy, the north half of lot X were worth ten times as much as the south half and the taxes of John Doe both real and personal were assessed against the whole of lot X and said lot was sold as a unit for such taxes; and if Richard Roe should foreclose his mortgage against the north one half of lot X; Richard Roe may redeem the north one half by paying one half of the taxes and John Doe must pay the other half of the taxes to redeem the south one half of lot X which is perhaps not worth the taxes against it. The south one half of lot X has never been assessed for taxes as a unit, it has never been advertised for sale and has never been sold at public auction or at all. Clearly John Doe in such a case would be deprived of his property without due process of law and the decision of the Supreme Court of Arizona in this very case has said that whereas lot 8, Block 1, Churchill, was advertised for sale and sold as a "unit" for taxes, that nevertheless, the south one half of said lot was redeemed by the then owner upon payment of one half of the taxes, and a deed was thereafter issued by the said treasurer to the remaining north one half. In the mean time and long prior to the giving of the said treasurer's deed, your petitioner

Skousen had become the owner of the north one half of the property by way of foreclosure and sale. (R. 76, 77). The issuance of the treasurer's deed to the north one half of lot 8, Block 1, Churchill, clearly deprived your petitioner Skousen of his property without due process of law for The North One Half of Lot 8, Block 1, Churchill has Never been Assessed for Taxes, Advertised nor Sold, Every feature of due process of law is, not merely insufficient, But Wholly Lacking.

It is imperative by

> Section 18 of Chapter 103, Session Laws of Arizona 1913,

being found in

> Volume 5 of Arizona Code Annotated 1939, page 639 Section 73-804

that the property must be described in the Notices of Tax Sale as it is described on the Tax Roll. The north one half of Lot 8, Block 1, Churchill, never even appeared upon the Tax Roll.

When the description in the deed does not even appear upon the Tax Roll it has been squarely held by the United States Supreme Court that the deed is absolutely void.

Bird vs. *Benlisa,* 142 U. S. 664.

From this case we quote at page 667:

> "The collector can only sell the lands as described on the assessment roll * * * Section 20 above, only extends its protection to the lands assessed, because, if other lands, or lands differing materially in description, are deeded by the clerk, THE DEED IS NOT A DEED MADE IN PURSUANCE OF A SALE OF LANDS FOR TAXES; NOR IS A SUIT FOR THE RECOVERY OF POSSESSION THEREOF A SUIT FOR LANDS SOLD FOR TAXES."

See also:

Raymond vs. *Longworth*, 14 How. 76; 14 L. Ed. 333.

> "If the property intended to be assessed is but a part of a larger tract this fact must be made to appear on the assessment roll for a description of the larger tract alone is not a sufficient description of its parts."

61 *Corpus Juris Section* 889.

It is clear beyond per adventure that no property can be properly valued, and no fair sale, and indeed no sale at all can take place where the various parcels of land to be sold are not separated from the very beginning, appraised, taxed, advertised and sold as units. As to the north one half (½) of Lot 8, Block 1, Churchill, petitioners have surely been deprived of their property without due process of law by reason of the interpretation placed upon Section 42, Chapter 103, of the Laws of 1931, by the Supreme Court of Arizona as set forth in its decision herein (R. 105).

Summary.

Your petitioners are relying in this petition and brief for Certiorari upon the contention that the decision of the Supreme Court of Arizona deprives them of their property without due process of law for three reasons, to-wit:

1—The Supreme Court of Arizona has indulged in the presumption that an officer in a proceeding for the sale of property for delinquent taxes is presumed to do his duty and the burden is upon the assailant of a tax deed even in the absence of statute.

This position is at least erroneous as a general proposition of law and tends to show how far the court is willing to go in an attempt to uphold a very doubtful sale and we think should be persuasive with this Honorable Court even

if it should conclude that the burden of proof does not come within the purview of the Fourteenth Amendment.

2—The second point is that the Supreme Court of the State of Arizona has interpreted Section 3084 R. C. A. 1928, see opinion (R. 103) in such a fashion as to permit the assessor to virtually dedicate land and in this particular case to take your petitioners' property without due process of law.

3—The third point is that the Supreme Court of the State of Arizona has interpreted Section 42 of Chapter 103 of the laws of 1931 so as to deprive petitioners of their property without due process of law (R. 105).

The first point relied upon, namely, the burden of proof, may not involve a privilege or immunity claimed under the Constitution of the United States, but if your petitioners' interpretation of the Arizona Statutes involved in the second and third points is correct then it is clear that by reason of each of these said interpretations your petitioners have been deprived of their property without due process of law.

WHEREFORE it is respectfully submitted that a Writ of Certiorari should issue in this cause.

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